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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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| CARGILL, INCORPORATED |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. ~ |) | Docket No. 42120 |
| |) | |
| BNSF RAILWAY COMPANY |) | |
| |) | |
| Defendant. |) | |

**BNSF'S OPPOSITION TO
CARGILL'S MOTION TO COMPEL DISCOVERY**

Defendant BNSF Railway Company ("BNSF") hereby replies in opposition to Complainant Cargill, Inc.'s ("Cargill") motion to compel discovery dated March 31, 2011 (hereafter "Cargill Motion"). For the reasons set forth below, the Board should deny Cargill's Motion.

As an initial matter, BNSF notes that it was surprised to receive Cargill's Motion. BNSF believed that the parties were making progress during their meet and confer sessions to narrow the scope of the disagreements they had regarding BNSF's responses to Cargill's discovery requests and that the meet and confer process had not been completed. Cargill did not inform BNSF that it intended to file the Motion. While completion of the meet and confer process might not have eliminated all disputes between the parties, it likely would have narrowed further the issues that needed to be presented to the Board.

INTRODUCTION

In two sets of Document Requests, Cargill has served BNSF with 54 separate Requests for Production (RFP), many of which have multiple subparts (e.g. RFP 6 has seven subparts,

RFP 45 has 16 subparts, RFP 49 has nine subparts). Unlike Cargill, which objected to producing *any* documents in response to most of BNSF's document requests, BNSF has agreed to produce documents responsive to the vast majority of Cargill's document requests. *See* BNSF's Objections and Responses to Cargill's First Set of Interrogatories and Document Requests; BNSF's Objections and Responses to Cargill's Second Set of Document Requests 's First Set of Discovery Requests, attached as Appendix 3 and Appendix 4, respectively to Cargill's Motion.

BNSF has collected tens of thousands of documents and has had eight to ten attorneys working full time for over three weeks reviewing these documents for responsiveness to Cargill's document requests. On April 4, 2011, BNSF produced over 32,000 pages of documents in response to Cargill's requests as well as traffic data requested by Cargill for specific shipments subject to the challenged mileage-based fuel surcharge for the years 2006 through 2010. In late March, BNSF produced train movement data for its entire system for the years 2006 through 2010 in response to Cargill's requests. The eight to ten dedicated attorneys continue to review BNSF documents for responsiveness to Cargill's requests. In contrast, Cargill has only produced 945 pages in response to BNSF's document requests and that production was not made until April 8, 2011.

1. BNSF Has Agreed to Produce Most Categories of Documents Requested By Cargill

Cargill begins its motion by describing general categories of documents sought in its document requests. *See* Cargill Motion at 2-3. A review of BNSF's responses to Cargill's requests shows that BNSF has agreed to produce documents responsive to most of the categories of documents that Cargill claims its document requests are designed to capture. Specifically, with respect to the document categories identified by Cargill at 2-3 of its motion, BNSF has agreed to produce:

- “Documents discussing how BNSF developed the component parts in the challenged mileage-based fuel surcharge formula, including studies and analyses BNSF relied upon when it first promulgated this formula” (*See* BNSF responses to cited RFP Nos. 3-7, App. 3 to Cargill Motion at 11-14).

- “Documents discussing any considered updates, or changes made, in the initial formula design, including BNSF’s publication of the rebased mileage fuel surcharge” (*See* BNSF responses to cited RFP Nos. 8, 18-23, App. 3 to Cargill Motion at 14, 20-23) to the extent they relate to the challenged mileage-based fuel surcharge. As discussed below, BNSF has withdrawn its prior objection to producing materials relating to BNSF’s new rebased carload fuel surcharge program in light of Cargill’s subsequent amendment of its original complaint.

- “Documents containing locomotive fuel cost and fuel consumption data and analyses” (*See* BNSF responses to cited RFP Nos. 12, 13, 15-17, 29-36, 44, App. 3 to Cargill Motion at 16-20, 25-28, 34-35). The only cited request to which BNSF objects is RFP 34 on grounds that BNSF does not maintain the requested information in the ordinary course of business and a burdensome special study would need to be undertaken to provide information responsive to the request. (*See* BNSF response to RFP 34, App. 3 to Cargill Motion at 27).

- “Documents addressing fuel surcharge revenues and profitability” (*See* BNSF responses to cited RFP Nos. 10, 11, 14, App. 3 to Cargill Motion at 15-18) to the extent they relate to the challenged mileage-based fuel surcharge.

- “Documents containing traffic, revenue and fuel surcharge data for shipments subject to the assailed fuel surcharges (RFP Nos. 24-28, 37-43).”

- “Documents produced, or related to, other litigations or proceedings involving claims that BNSF was collecting fuel surcharges in excess of its actual incremental fuel cost increases (RFP Nos. 45-53)” to the extent the documents relate to the challenged mileage-based fuel surcharge. (See BNSF responses to cited RFP No. 45, 48-51, 53, App. 4 to Cargill Motion at 2, 5-10).

- “[D]ocuments relating to BNSF’s review of mileage-based fuel surcharges used by other rail carriers (RFP No. 54)” to the extent the documents relate to the challenged mileage-based fuel surcharge. (See BNSF responses to cited RFP No. 54, App. 4 to Cargill Motion at 10).

2. Contrary to Cargill’s Claims, BNSF’s Responses Indicate That BNSF “Will Produce,” Not “May Produce,” Documents Responsive to Most Cargill Requests

Cargill inaccurately asserts that BNSF has only indicated that it “may produce” documents in response to many requests. See Cargill Motion at 3-4. To the contrary, a review of the final sentence of each of the document responses cited by Cargill shows that BNSF has stated that it “will produce” documents responsive to the request and defines the scope of the production that BNSF has agreed to produce. For example, in response to RFP 10 (emphasis added), BNSF states that it “*will produce* responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of the proceeding, if any.” BNSF confirmed this approach during the meet and confer sessions with Cargill.

Consequently, the cases that Cargill cites at pages 4-5 of its motion regarding courts’ disfavor with parties who engage in “hide-the-ball discovery tactics” are inapposite. In the *Athridge* case cited by Cargill, the court took issue with objections stating that a party will produce “*relevant, non-privileged*” material, finding that such an objection permits the defendant

to “arrogate[] to itself the authority to decide the question of relevance which is unquestionably the decision of the judge.” See *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998) (emphasis added). BNSF did not use the formulation of concern to the court in *Athridge*. BNSF explained in its response to each document request cited by Cargill that it will produce “responsive, non-privileged” documents. BNSF clearly set forth any limitations on the scope of what BNSF was agreeing to produce. Determining whether a document is responsive or not to a request does not interfere with any responsibilities of the Board. Each party is tasked with determining whether documents are responsive when they review documents for production.

ARGUMENT

Under the Board’s rules, a party may obtain discovery “not privileged, which is relevant to the subject matter involved in a proceeding . . .” 49 CFR § 1114.21(a)(1). However, a party is not entitled to discovery that imposes “undue burden or expense.” 49 CFR § 1114.21(c). While discovery may be broad in Board proceedings, it is subject to limitations. The Board requires “more than a minimal showing of potential relevancy” before granting a motion to compel discovery. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292 (1997). Complainants must demonstrate a real, practical need for the information. See *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, slip op. at 2 (STB served Nov. 24, 2010) (citing *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548 (1985)).

If a discovery request seeks irrelevant information, or if the marginal relevance of the information is outweighed by the undue burden or expense involved in collecting, reviewing and producing the information, the party is not entitled to discovery responsive to the request. See *FMC Wyoming Corp and FMC Corp. v. UP*, STB Docket No. 42022, 1998 WL 44782, at *4

(STB served Feb. 5, 1998) (acknowledging that certain requested discovery was burdensome, and requiring a substantial showing of relevance and need to outweigh the burden of production).

Cargill's motion to compel seeks six general categories of information. BNSF addresses each one of them separately below. For the reasons set forth below and under the governing discovery standards, Cargill's motion to compel should be denied.

1. Internal Management Cost (IMC) Information (General Objection No. 6): Cargill requests that the Board overrule BNSF's general objection number 6 to the production of internal management cost information. See Cargill Motion at 6-7. Shippers frequently seek information about a defendant's internal management cost system in cases before the Board. The Board has made it clear, however, that it does not allow such discovery given the extreme sensitivity of internal management cost information and its irrelevance to the regulatory standards applied by the Board.¹ In a recent case, the Board reiterated that it has "consistently ruled against motions to compel internal costing data because, for regulatory purposes, including rate reasonableness cases, costs are determined by URCS."²

¹ The cases Cargill cites to support production of internal management cost information (see Cargill Motion at 7, n. 13) are decades old and readily distinguishable. Three of the four cited cases were decided before 1989 and therefore pre-date the adoption of URCS, the Board's method of calculating costs. The only decision Cargill cites that was decided after the adoption of URCS merely compelled defendant to provide an *explanation of its internal costing methodology*, not any actual cost calculations. See *Increased Rates on Coal, L&R RR v. Louisville & Nashville R.R.*, ICC Docket No. 37063, WL 287825 at *1 (ICC served August 22, 1990) (emphasis added).

² *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, slip op. at 3 (STB served Dec. 23, 2010); see also *Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry.*, 4 S.T.B. 64, 1999 WL 291797, at *7 ("[T]he output produced by the defendant carrier's proprietary costing system is not likely to produce URCS-compatible variable costs. Therefore, DMIR's costing system and studies produced by that system are not relevant to this proceeding."); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123, 2010 WL 5211797 (STB served December 23, 2010) (denying discovery of profitability information and other internal costing data); *Duke Energy Corp. v. Norfolk S. Ry. Co.*, STB Docket No. 42069, 2005 WL 759695 (STB served April 5, 2005) (denying discovery of

Cargill does not have any discovery requests that expressly seek internal management cost information. BNSF's objection, therefore, only involves management cost information that is contained in otherwise responsive documents. As to such information, BNSF is willing to produce internal management cost information if such information was generated in the ordinary course of business from the management cost system and relates to BNSF's fuel costs and fuel consumption. Since Cargill filed its Motion before the meet and confer process had been completed, Cargill was not aware that BNSF was taking this position on management cost information. Consequently, Cargill will receive the responsive fuel consumption studies that it references in its Motion. *See* Cargill Motion at 6.

However, if the internal management cost information in an otherwise responsive document does not relate to BNSF's fuel costs or fuel consumption, then BNSF plans to redact it from the document produced to Cargill. This information is not even responsive to Cargill's requests – it is typically margin, contribution or variable cost information developed from the internal management cost system. BNSF's approach to the production of sensitive internal management cost issue is reasonable, and it should not be disturbed.

2. Shipper-specific information (General Objection Nos. 1, 10):

With the exception of Cargill information, BNSF is redacting shipper-specific information in otherwise responsive documents on the basis that this extremely sensitive information is not relevant to the issues in this case. The Board has made clear that shipper-specific information is not relevant to this proceeding. In its January 4, 2011 decision granting in part and denying in part BNSF's partial motion to dismiss, the Board noted that Cargill's claims

profitability analyses); *Texas Mun. Power Agency v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42056, 2001 WL 112303 (STB served February 9, 2001) (denying discovery of information relating to internal costing methodology).

in this case “focus[] on how the fuel surcharge program operates in the aggregate and not solely on how it operates with respect to Cargill” and that “Cargill may present evidence to demonstrate that the design elements in the challenged fuel surcharge allow BNSF to recover substantially in excess of the actual incremental cost of fuel in providing the rail services *to the entire traffic group to which the surcharge applies.*”³

Cargill states that it has “no objection to BNSF’s prudent use of redactions [of information that could be used to identify specific shippers] so long as Cargill can properly utilize the redacted information.” Cargill Motion at 8. But Cargill fails to inform the Board that BNSF already has agreed to accommodate Cargill’s concerns about “utilize[ing] the redacted information” in this case. As BNSF explained to Cargill in the meet and confer sessions, BNSF is producing traffic data, except the shipper name, for each individual shipment on BNSF subject to the challenged mileage-based fuel surcharge for the years 2006 through 2010. And in response to Cargill’s comments at the meet and confer sessions, BNSF agreed to expand its production of traffic data so that Cargill could carry out fuel consumption analyses that it wishes to perform without revealing shipper-specific information.

If other instances arise in which Cargill believes it legitimately needs additional information about a particular movement, BNSF will work with Cargill to address that concern. It is premature and unreasonable for Cargill to seek an order now that would overrule BNSF’s general objection to the production of shipper-specific information about shippers other than Cargill.

3. Rebased Fuel Surcharge Effective January 2011 (General Objections 13, 15, 22, 23;

RFP Nos. 21, 23): In its motion, Cargill requests the Board to overrule BNSF’s objection to

³ *Cargill, Inc. v. BNSF Ry. Co.*, STB Docket No. 42120, at 5 (STB served Jan. 4, 2011) (emphasis added) (hereafter “*Board Decision*”).

producing documents relating to BNSF's rebased mileage fuel surcharge applicable to carload traffic that became effective January 1, 2011. *See* Cargill Motion at 9-10, 14, 17-18. This request is moot since BNSF plans to produce such documents now that Cargill has supplemented its complaint to include a challenge to this rebased mileage-based fuel surcharge.

In its document responses, BNSF objected to producing documents relating to its rebased mileage fuel surcharge for carload traffic effective January 1, 2011 because that rebased surcharge was adopted after the complaint was filed and was outside the scope of the proceeding. *See, e.g.*, BNSF General Objections 13, 22, App. 3 to Cargill's Motion at 4-5. BNSF explained during the meet and confer process that if the rebased mileage-based fuel surcharge for carload traffic effective January 2011 became part of the case, BNSF would no longer object to producing documents relating to it. Cargill then supplemented its complaint to include the January 1, 2011 rebased mileage fuel surcharge applicable to carload traffic. As a result, BNSF now agrees to produce documents responsive to Cargill's requests relating to the rebased mileage fuel surcharge applicable to carload traffic effective January 2011 and is in the process of collecting responsive materials.

4. Time Period for Discovery (General Objection No. 28): Cargill asks the Board to overrule BNSF's objection to producing documents dated prior to January 1, 2005 and subsequent to April 19, 2010, the date the complaint was filed. *See* Cargill Motion at 10-13. In its discovery requests served on January 11, 2011, Cargill specified that the responses "cover the time period from January 1, 2003 to the present" unless otherwise specified.⁴ In its Motion, Cargill seeks an order compelling production of documents and data from January 1, 2003 through March 1, 2011. Cargill Motion at 11, 13. For the reasons set forth below, BNSF is

⁴ Cargill's First Set of Interrogatories and Requests for Production of Documents, Instruction 11 (App. 1 to Cargill Motion at 11).

willing to produce documents and data created between September 1, 2004 and December 31, 2010 unless a different date range is specified in a document request. BNSF requests that the Board deny Cargill's motion to the extent it seeks documents or data created outside that time period because the burden associated with collecting and reviewing documents outside BNSF's proposed time period far outweighs the potential relevance of such documents.

With respect to the end date for production (a topic never raised by Cargill in the meet and confer sessions), BNSF is willing to produce documents and data through December 2010 and, indeed, already has produced traffic and train movement data through December 2010. Documents and data created during January and February 2011 would likely be cumulative of the documents and data created during the lengthy time period – September 1, 2004 through December 2010 – that Cargill will be receiving. The marginal relevance of these additional two-months of data and documents is outweighed by the burden associated with producing that material. BNSF traffic and train movement data is time-consuming to collect and the data for a particular month is not available immediately after the end of the month. For example, substantially complete traffic data for February 2011 will not be available until approximately two months after February ends. Further, in order to respond as quickly as possible to Cargill's requests, BNSF collected documents from its custodians prior to March 1, 2011 and, consequently, did not collect documents created through March 1, 2011. It would be unduly burdensome to require BNSF to contact those custodians again and request them to collect documents created through March 1, 2011.

With respect to the start date, BNSF has proposed a general start date of September 1, 2004, unless a later start date is specified in the request. Using September 1, 2004 as the start date, BNSF will produce information created seven months before BNSF announced in March

2005 that it was adopting a mileage-based fuel surcharge that would apply to agricultural traffic and sixteen months before the challenged mileage-based fuel surcharge went into effect on January 1, 2006. Moreover, BNSF stated in its discovery responses and reaffirmed to Cargill in the meet and confer sessions that BNSF would agree to supplement its document production with a targeted search for documents that relate to a specific design element of the mileage-based fuel surcharge that may have been developed prior to September 2004, namely the “strike price” of \$1.25 HDF. *See* BNSF response to RFP No. 5, App. 3 at 12.

To impose a general start date of January 1, 2003 for all Cargill’s discovery requests unless otherwise specified would impose a substantial and undue burden that far outweighs any relevance of materials that were generated three years before the challenged mileage-based fuel surcharge became effective, particularly given that BNSF has agreed to do a targeted search to produce documents relating to mileage-based fuel surcharge design elements that may have been adopted prior to September 1, 2004. Using the general discovery start date of September 1, 2004 that it is proposing, BNSF already has collected tens of thousands of documents to review for responsiveness to Cargill’s requests. Cargill’s request that the Board impose a general discovery start date that is 20 months earlier would necessitate the review of thousands of additional documents and result in a burden that far outweighs the potential relevance of the documents.

5. Percent of Revenue and Coal Mileage-Based Fuel Surcharges (RFP 9): Cargill also requests the Board to overrule BNSF’s objection to producing documents relating to fuel surcharge programs that are not at issue in this case, specifically BNSF’s percent of revenue fuel

surcharges and its mileage-based fuel surcharge that applies to coal traffic. *See* Cargill Motion at 14-15, 16-17.⁵

As BNSF explained to Cargill in the meet and confer sessions, BNSF does not intend to redact information relating to other fuel surcharge programs from documents that are otherwise responsive to Cargill's requests. Cargill will therefore obtain substantial information relating to BNSF's coal mileage-based fuel surcharge and its percent of revenue fuel surcharges. BNSF is simply taking the position that it is not going to search for or produce documents that relate only to fuel surcharge programs that are not at issue in this proceeding. To the extent that documents relate solely to BNSF's coal mileage-based fuel surcharge or percent of revenue fuel surcharges, any marginal relevance that the documents may have is far outweighed by the burden associated with collecting, reviewing and producing them.

BNSF's coal mileage-based fuel surcharge and its percent of revenue fuel surcharges have different formulas than the challenged mileage-based fuel surcharge and they are applied to different traffic than the challenged mileage-based fuel surcharge formula. Consequently, information regarding the percent of revenue fuel surcharges and coal mileage-based fuel surcharge have little to no relevance to the questions raised in this proceeding which relate solely to the challenged mileage-based fuel surcharge or Assailed Tariff Item, as Cargill refers to it. Those questions are whether (1) "the general formula set forth [in the Assailed Tariff Item] to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied", and whether (2) "BNSF is using the

⁵ Cargill also makes the unfounded claim that BNSF may only produce documents relating to the challenged carload mileage-based fuel surcharge if the document specifically mentions the tariff item in which that mileage-based fuel surcharge is set forth. *See* Cargill Motion at 14. BNSF never made such an assertion to Cargill at a meet and confer. To the contrary, BNSF is producing responsive documents relating to the challenged mileage-based fuel surcharge irrespective of whether the document mentions tariff item 3375, section B.

Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied.” See Cargill Complaint at ¶ 6, 7; see also Board Decision at 3.

The marginal relevance of information related solely to fuel surcharges not at issue in this proceeding is substantially outweighed by the burden that would be associated with collecting and reviewing for production the thousands of documents that relate solely to those other fuel surcharges. The Board should deny Cargill’s motion to compel the production of documents related solely to BNSF fuel surcharges that are not challenged in this proceeding.

6. Documents from the Rail Freight Fuel Surcharge Antitrust Litigation (RFP Nos. 45, 46, 47): Cargill has also asked the Board to order BNSF to produce certain documents produced and all transcripts of BNSF depositions taken in another litigation – *In re Rail Freight Fuel Surcharge Antitrust Case* (hereafter “*Antitrust Case*”). See Cargill Motion at 18-21. Because the issues in that antitrust case are different than the issues in this litigation and it would be extremely burdensome to respond to at least one of Cargill’s requests, the Board should deny Cargill’s request.

A brief description of the issues in the *Antitrust Case* may assist the Board in resolving this issue. That case alleges that four Class One railroads, BNSF, NS, CSXT and UP, entered into a conspiracy in 2003 to use rail fuel surcharges as a means to fix or stabilize rail prices.⁶ That case focuses on a purported conspiracy between railroads that allegedly occurred three or more years before the adoption by BNSF of any mileage-based fuel surcharge, including the mileage-based fuel surcharge at issue in this case. The *Antitrust Case* does not include

⁶ Second Consolidated Amended Class Action Complaint at ¶ 2 filed February 3, 2010 in *In re Rail Freight Fuel Surcharge Antitrust Case*, MDL Docket No. 1869, Misc. No. 07-489 (DDC).

allegations of conspiracy relating to the mileage-based fuel surcharge at issue in Cargill's unreasonable practices complaint here. Indeed, in their motion for class certification, the plaintiffs in the *Antitrust Case* expressly excluded any payments under a mileage-based fuel surcharge from the class and limited the class to those that paid a percent of rate rail fuel surcharge.⁷

- RFP No. 45: Cargill requests the Board to order BNSF to produce documents responsive to 16 separate document requests served by plaintiffs in the *Antitrust Case*. BNSF produced over 850,000 pages in the *Antitrust Case* and it did not identify which documents were responsive to which requests served by plaintiffs. Consequently, BNSF cannot identify which documents produced in the *Antitrust Case* are responsive to the 16 document requests identified by Cargill without reviewing the entire 850,000 page production. In any event, BNSF informed Cargill that BNSF would be producing in this proceeding some documents that had been produced in the *Antitrust Case* because BNSF was reviewing a subset of the documents produced in that case "for responsiveness to the requests that BNSF did not object to in Cargill's First Set of Discovery Requests."⁸ For example, BNSF has reviewed documents produced in the *Antitrust Case* dated September 1, 2004 and thereafter that mention mileage-based fuel surcharge for responsiveness to Cargill's First Set of Requests. Thus, BNSF already has agreed to produce the documents from the *Antitrust Case* that are the most likely to be relevant in this proceeding because they are responsive to Cargill's First Set of Requests. It would be unduly burdensome for BNSF to review other documents from the massive production in the *Antitrust Case* to

⁷ Plaintiffs' Memorandum in Support of Motion for Class Certification at 1 (filed under seal March 18, 2010; public version filed on March 30, 2010).

⁸ BNSF response to RFP 45 (App. 4 to Cargill Motion at 2-3).

identify documents that are unlikely to be at all relevant in this case because they are responsive to requests formulated by the plaintiffs in the *Antitrust Case* for issues raised in that case.

- RFP 46: Cargill requests the Board to order BNSF to produce the deposition transcripts and accompanying exhibits of BNSF employees deposed in the *Antitrust Case*. Given that the issues in the *Antitrust Case* are different than the issues in this case – the focus is on whether the railroad defendants in the *Antitrust Case* conspired regarding percent of rate fuel surcharges back in 2003 – such deposition transcripts are not relevant in this proceeding. In addition, as BNSF explained in its response to this request and during the meet and confer sessions, some of the exhibits to the BNSF depositions were produced by other parties in the *Antitrust Case* and, as a result, BNSF is precluded by the protective order in the *Antitrust Case* from producing those exhibits or the deposition testimony relating to them.⁹ Under that protective order, BNSF is required to notify those parties of any order issued in a separate litigation requiring the production of their produced documents and to provide those parties with an opportunity to protect their confidentiality interests in their documents in this proceeding.

- RFP 47: Cargill also requests the Board to order BNSF to produce BNSF documents identified in an affidavit submitted by plaintiffs in the *Antitrust Case*. The affidavit itself simply lists the bates numbers of the documents that are attached to the affidavit – it provides no description of the contents of the document.¹⁰ In its Motion at 21, Cargill asserts that these documents are relevant because “[b]ased on Plaintiffs’ counsel summary of some of these documents in open court in the antitrust case on October 6 and 7, 2010, it appears that these documents contain highly relevant information concerning BNSF’s use of fuel surcharges to

⁹ BNSF response to RFP 46 (App. 4 to Cargill Motion at 3).

¹⁰ This affidavit is included as Attachment 2 to Appendix 2 of Cargill’s Motion.

over-recover its actual incremental fuel cost increases.” This broad, general assertion does not establish the relevance of these documents. Cargill does not suggest that these documents relate to the challenged mileage-based fuel surcharge in this case. Given the antitrust plaintiffs’ focus on percent of rate fuel surcharge and the May 14, 2007 end date for document discovery in the *Antitrust Case*, Cargill has not shown that these documents are relevant to this proceeding.

CONCLUSION

For the reasons set forth above, the Board should deny Cargill’s motion to compel.

Respectfully submitted,



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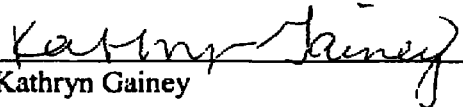
ATTORNEYS FOR DEFENDANT

April 11, 2011

Certificate of Service

I hereby certify that on this 11th day of April, 2011, I have served a copy of the foregoing BNSF Opposition to Cargill's Motion to Compel Discovery on the following by e-mail and by hand delivery:

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